No. 96-1395

In The

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

LESTER E. ERICKSON, JR., ET AL.,

Respondents.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

HARRY R. MCMANUS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENT ERICKSON

PAUL E. MARTH
Counsel for Respondent Lester E. Erickson
FORMAN, MARTH, BLACK & IDDINGS, P.A.
235 N. Greene Street
P. O. Box 2020
Greensboro, NC 27402-2020
(910) 378-0172

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER THE DUE PROCESS CLAUSE ALLOWS FEDERAL AGENCIES TO CHARGE AN EMPLOYEE WITH FALSIFICATION WHEN SUCH EMPLOYEE SIMPLY DENIES ALLEGATIONS OF MISCONDUCT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

Lester Erickson, a Police Sergeant with the Bureau of Engraving and Printing, was removed from his position for two charges of wrongdoing. Charge 1 was captioned: "Making False Statements in Matters of Official Interest" and concerned Sgt. Erickson's response to an investigation on October 30, 1992.[1] Specifically, the agency was investigating the source of inter-office telephone calls in which the caller would, without identifying himself, laugh madly into the telephone and hang up.[2]

The Agency distributed written questionnaires among members of the police unit, including Sgt. Erickson.[3] To the question, "Approximate the number of occasions you made 'Mad Laugher' calls and to whom by name?" Sgt. Erickson responded, "None." To the question, "Approximate time you quit participating in 'Mad Laugher' calls," Sgt. Erickson responded, "I never participated." To the question, "Specifically, how many times did you ask your subordinates to cease the 'Mad Laugher' calls?" Sgt. Erickson responded, "None, because I do not know who is doing it." Finally, to the question, "Are you willing to specifically state all those that are participants in the 'Mad Laugher' telephone calls?" Sgt. Erickson's response was, "No – I do not know the true identification of the 'Mad Laugher.' In my opinion it is 95% of the police unit (and) also possibly personnel in

---

[1] Respondent Erickson's Appendix, 1a-2a.

[2] Respondent Erickson's Appendix, 3a-6a.

[3] Respondent Erickson's Appendix, 3a-6a.

Production."[4] In fact, other employees were found to have participated in the "Mad Laugher" incidents.[5]

Based on the responses submitted by other members of the police unit, Sgt. Erickson's superior, Carol Williamson, concluded that he had participated in the 'Mad Laugher' caper and that his statements quoted above were false. She further concluded that his conduct violated Section 0.735-55 of the Department's Minimum Standards of Conduct. The standard prohibits employees from uttering or writing false, misleading or ambiguous statements, deliberately or willfully, in connection with an official matter.[6]

In Charge 2, captioned, "Conduct Unbecoming a Supervisor," Sgt. Erickson allegedly urged a co-employee to make a "Mad Laugher" call. Although the employee had not made the call, Sgt. Erickson's conduct was found inappropriate and unacceptable.[7]

After the Administrative Law Judge upheld Sgt. Erickson's removal, he appealed to the Merit Systems Protection Board. The Board denied his petition for review, but reopened the case on its own motion.[8]

The Board began its review with the proposition, stated in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574-1575 (Fed. Cir. 1988), that an agency may not

---

[4] Petitioner's Appendix, 52a-53a.

[5] Respondent Erickson's Appendix, 4a-6a, 8a.

[6] Respondent Lester Erickson's Appendix, 3a.

[7] Respondent Lester Erickson's Appendix, 6a, 8a-9a.

[8] *Erickson v. Department of the Treasury*, 63 M.S.P.R. 80 (1994); Petitioner's Appendix, 50a.

charge an employee with falsely denying misconduct when it separately charges him with the misconduct. Charge 1 was not sustained because its essence consisted of Sgt. Erickson's failure to admit his participation in the conduct under investigation.[9]

The Board further found, however, that Sgt. Erickson was never actually charged with the underlying conduct. Charge 1 was concerned with the veracity of his statements while Charge 2 dealt with his encourgement to another employee to initiate a "Mad Laugher" call. Neither charge gave Sgt. Erickson notice that he was charged with "Mad Laugher" calls. Consequently, the Board disregarded the agency's allegation that Sgt. Erickson made the calls. The *Initial Decision*, sustaining Charge 1, was therefore reversed.[10] The Board sustained Charge 2, but mitigated the penalty to a fifteen day suspension.[11]

The Office of Personnel Management then appealed this decision to the Federal Circuit Court of Appeals. Several cases involving charges of falsification were then consolidated. The Federal Circuit, in *King v. Erickson*, 89 F.3d 1575 (Fed. Cir. 1996),[12] affirmed the Merit System Protection Board's decisions. Following denial of its petition for a hearing and suggestion for a rehearing *en banc*,[13] the Office of Personnel Management petitioned

---

[9] Petitioner's Appendix, 52a-53a.

[10] Petitioner's Appendix, 53a-54a.

[11] Petitioner's Appendix, 54a-55a.

[12] Petitioner's Appendix, 1a-23a

[13] Petitioner's Appendix, 108a-109a

this Court for a writ of certiorari, which this Court granted.

SUMMARY OF THE ARGUMENT

By virtue of their property right in employment, federal employees possess an entitlement to minimum due process procedures, which consist of notice and a meaningful opportunity to respond, prior to deprivation of their interest. Both prongs of this "entitlement" are impacted herein. First, Sgt. Erickson was never charged with the underlying misconduct, i.e. making the "mad laugher" phone calls. Consequently, as correctly noted by the Merit Systems Protection Board, he lacked notice of the charge against him. Secondly, if federal agencies, may, as the result of an employee's "response," charge the employees with falsification and thus boost the alleged misconduct to a level which warrants a property deprivation, there is a risk of erroneous deprivation and a subsequent chilling of an employee's right to a meaningful response.

The Federal Circuit's prior decision in *Grukba v. Department of the Treasury, supra,* illustrates an erroneous deprivation as a result of a falsification charge. Therein, the Court concluded that charging the employee with falsification, based on his denial of misconduct, violated his procedural due process rights. It was the addition of the falsification charge that boosted the totality of the alleged misconduct to a level which implicated due process protections.

King v. Erickson, supra, held that a threatened falsification charge effectively thwarts the employee's right to respond and is therefore, improper. Federal employees, aware of the risk of a falsification charge and its attendant consequences, would feel coerced into admitting facts consistent with the government's case. Faulty memories, or divergent perceptions, could too easily turn credibility determinations into falsification charges.

The Federal Circuit cautioned, however, that a right of denial of misconduct does not equate to a right to lie or affirmatively mislead an agency. Beyond the narrow right to deny the specific facts and underlying legal basis constituting the charge, an employee has no right to invent stories or tamper with evidence. The Federal Circuit clearly stated that such conduct provides the basis for falsification or related charges.

Despite Petitioner's contention that the Federal Circuit has created an "expansive right to lie" (*Brief for the Petitioner*, p. 19) among federal employees, the Merit Systems Protection Board, to which federal employees may appeal adverse actions, has since sustained penalties for affirmative misstatements, or "lies." *Kirkpatrick v. United States Postal Service*, 74 M.S.P.R. 583 (1997). The only response to which *Erickson* extends protection is a denial of misconduct and the Board has adhered to this rule.

Petitioner's reliance on *United States v. Dunnigan*, 507 U.S. 87 (1993) and an array of other criminal cases is misplaced. *Dunnigan* found that enhancing a sentence for perjury was constitutionally permissible where the alleged perjury met all elements of the perjury statute, 18

U.S.C. § 1621. Trial courts were directed to make specific findings of fact on each element of perjury prior to enhancing a sentence. There are significant differences between post-conviction enhancement and pre-hearing investigation which Petitioner's argument overlooks.

Use of a criminal law model to analyze what due process is owed to federal employees at the pre-deprivation level is inappropriate. Each of the criminal defendants in Petitioner's cases were tried before independent, non-partial fact-finders. Each was convicted either of an underlying offense, or a perjury charge, on a standard of evidence that requires proof beyond a reasonable doubt.

In contrast, when federal employees face charges of misconduct, the employing agency investigates the facts, formulates the charges and initially, adjudicates guilt or innocence. While federal employees have a panoply of post-deprivation rights in the event they file appeals, the issue of an employee's right to a meaningful response must be viewed from the perspective of what due process is owed in the pre-deprivation setting.

Further, agency officials are under no compulsion to determine facts by any particular standard of proof, other than the statutory standard that an adverse action must occur "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513. They can rely on a preponderance of evidence, little evidence, or no evidence.[14] A "not guilty" plea in a criminal case does not subject the

---

[14] See *Grubka v. Department of the Treasury, supra*; *Erickson v. Department of the Treasury, supra*; and *Greer v. United States Postal Service*, 43 M.S.P.R. 180 (1990).

criminal defendant to a perjury charge and he is not deprived of his liberty until an offense has been proven beyond a reasonable doubt. In contrast, in *Erickson* and its companion cases, the denials of misconduct themselves triggered the property deprivations.

Finally, there is no requirement that agency officials set forth detailed findings of fact in order to sustain falsification charges. In short, the various protections that have been built into the criminal law system do not exist at the pre-deprivation level of federal employment. The gaps between Petitioner's criminal law analogy and the actual circumstances of federal employment only serve to beg the question as to what minimum due process procedures are owed in order to afford a federal employee a meaningful right to respond at the pre-deprivation level. This Court has held that the employee's opportunity to present his side of the story, prior to deprivation of his property interest, is an essential due process requirement.[15]

Due process is a flexible concept which calls for such procedural protections as the particular situation demands. *Gilbert v. Homer*, 117 S. Ct. 1807, 1818 (1997). To determine the scope of procedural due process protections, three factors must be balanced: (1) the private interest that will be affected by the official decision; (2) the risk of an erroneous deprivation through the procedures used and the probable value, if any, of additional

---

[15] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545 (1985).

or substitute safeguards; and (3) the government's interest. *Gilbert v. Homer, supra,* at 1812.

This Court has accorded significant weight to an employee's private interest in retaining employment. Deprivation of a livelihood is a severe penalty. *Cleveland Board of Education v. Loudermill, supra,* at 470 U.S. 543. As for the risk of an erroneous deprivation, it is undisputed that in all the cases at bar, the additional falsification charges resulted in either demotion or termination. Disputed factual scenarios are common and a deciding official's initial determination of credibility often proves to be erroneous. *Grubka v. Department of the Treasury, supra; Greer v. United States Postal Service,* 43 M.S.P.R. 180 (1990).

Petitioner argues that its interests are detrimentally affected by the *Erickson* rule. Yet, in all but one of the cases before this Court (where the employee recanted his earlier denial),[16] the agencies succeeded in proving misconduct by other evidence.

Petitioner repeatedly and incorrectly characterizes *Erickson* as sanctioning an unfettered right to lie. The MSPB's interpretation of *Erickson* clearly shows that it does not characterize the case in that light. *Kirkpatrick v. United States Postal Service, supra.* Petitioner fails to explain how separating simple denials from affirmative false statements is an onerous burden.

Finally, Petitioner's argument that, under *Erickson,* other individuals with other types of property interests

[16] *McManus v. Department of Justice,* 66 M.S.P.R. 586 (1995).

will be given the freedom to lie is beyond the scope of its "Question Presented."

ARGUMENT

King v. Erickson reinforces the federal employee's well established right to notice and opportunity to respond to charges against him. By virtue of 5 U.S.C. § 7513, federal employees possess a property right in their employment within the meaning of the Fifth Amendment to the United States Constitution.[17] This property right entitles federal employees to minimum due process procedures, which, pursuant to *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 546 (1985) consist of notice and a meaningful opportunity to respond. Charging employees with falsification when they deny misconduct can result in an erroneous deprivation of a property interest. This deprivation is amplified in this case as Sgt. Erickson was never charged with the underlying misconduct so his right to meaningful notice of the charge against him was also impaired.

The principle of law enunciated in *Erickson* is not new. The Federal Circuit merely reaffirmed and amplified

[17] 5 U.S.C. § 7512, 5 U.S.C. § 7513. Petitioner questions whether the Due Process Clause protects employees for an adverse action short of termination. *Brief for the Petitioner,* p. 27, footnote 8. As § 7512 enumerates adverse employment actions, including suspensions and reductions in pay, for which an agency must have "cause" to initiate under § 7513, it would appear that federal employees have due process protection for at least those adverse actions listed in § 7512.

its earlier decision in *Grubka v. Department of the Treasury, supra*. In *Grubka*, it was alleged that James Grubka, a supervisory employee of the Internal Revenue Service, had grabbed Harriet Novak, an agency recruit, kissed her and had become "sexually aroused." *Grubka v. Department of the Treasury, supra*, at p. 1572. In a subsequent agency investigation, Mr. Grubka was asked if he kissed Ms. Novak on the stairwell. He both denied the charge and executed a written statement to this effect. *Grubka*, at p. 1574.

The Merit Systems Protection Board upheld the agency's decision to demote Mr. Grubka, who then appealed to Federal Circuit Court of Appeals. In addressing the falsification charge, the Court stated as follows:

> The AJ sustained this charge and in doing so found Grubka guilty of making a false statement in a matter of official interest in denying that he kissed Novak in the hotel stairwell by proving by Novak that he did kiss her. In other words, the AJ held by circuitous reasoning that proof by Novak that Grubka kissed her ipso facto proved that his denial was false and therefore, his denial was a separate offense as charged. We do not agree. This was indeed a novel theory. The effect of it is to hold that a denial of a charge itself becomes a separate proven offense if what is denied is proven to be true. We have found no case, and no case has been cited to us 'hat approves such a theory. It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and, regardless of the outcome, the

> denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge. The decision of the AJ denied Grubka his due process rights in that it denied him the right to a trial on the charge without due process of law . . . We hold that the charge has no substance, is frivolous and the decision of the AJ sustaining it is not supported by substantial evidence and is erroneous as a matter of law.[18]

As in *Erickson*, it was the falsification charge itself that boosted the other charges to a level of misconduct warranting a significantly greater penalty.

In *King v. Erickson*, the Federal Circuit framed the issue as whether due process is threatened by charging employees with falsification after they deny incidents of misconduct. The Court answered this question affirmatively, because in its view, a threatened falsification charge impedes an employee's meaningful opportunity to respond.[19] The Federal Circuit correctly observed that in each case before it, the addition of the falsification charges had augmented the penalties to either removal or demotion. Federal employees, aware of the risk of a falsification charge, would feel coerced into admitting facts in line with those of the government's case. The circumstance of faulty memories or divergent perceptions would too readily transform credibility determinations into falsification charges. The consequent "chilling effect" on federal employees' right to respond would not comport

---

[18] *Grubka, supra*, at pp. 1574-1575.

[19] *King v. Erickson, supra*, at p. 1581.

with their due process rights.[20] While it is naturally easier for an agency to prove misconduct with the leverage of a threatened falsification charge, due process requires allowing an employee to deny both the charge and its underlying facts without risk of the falsification charge.[21]

The Federal Circuit cautioned that a right of denial does not equate to a right to lie or affirmatively mislead an agency. Beyond denial of the specific facts forming the charge, the employee had no right to invent stories, or tamper with evidence. Engaging in such conduct provides the basis for a falsification charge.[22] The Federal Circuit explicitly distinguished cases raised by OPM where the employees were charged with altering documents to conceal their misconduct.[23]

In support of its assertion that the Federal Circuit has, in fact, sanctioned an "expansive right to lie" (*Brief for the Petitioner*, p. 13), Petitioner touts the Federal Circuit's subsequent application of its rule to the various cases before it and states that, in fact, the Court sanctioned the very falsification that it had condemned (*Brief for Petitioner*, pp. 20-21). An examination of the facts of each case reveals that the rule was applied appropriately. Barrett and Roberts denied that they had worked on their supervisor's fish pond on government time. The falsification charge against them was reversed, but the charge for

---

[20] *Id.*, at p. 1583.

[21] *Id.*, at p. 1584.

[22] *King v. Erickson, supra*, at pp. 1583-1584.

[23] *Id.*, at pp. 1583-1584.

falsifying their time and attendance reports was upheld.[24] Although Ms. Kye apparently gave differing versions of when she possessed control over her Diners Club card, she consistently maintained that she had not used the card during the time in question. While she articulated a suspicion that her son had used the card, she did not affirmatively state that someone else had used it.[25] Although not addressed by Petitioner, all of Lester Erickson's statements were denials of misconduct. His statement, which he qualified as an opinion, that other personnel were involved in the "Mad Laugher" prank did ultimately prove true. Other employees were found to have been "mad laughers."[26]

Despite Petitioner's contention that "conflicting signals" have been sent to the Merit Systems Protection Board as a result of the *Erickson* decision (*Brief of Petitioner*, p. 21), the Board has not exhibited any difficulty in applying the rule. In *Kirkpatrick v. United States Postal Service*, 74 M.S.P.R. 583 (1997), a postal supervisor removed scrap aluminum from the maintenance facility and sold it to a recycling plant. When questioned about the matter, he replied that a vendor with a contract to collect the scrap had collected it. The MSPB found that this story constituted an affirmative misstatement under *Erickson* and upheld a charge of obstructing an official investigation by providing false information. Conversely in *Jefferson v. United States Postal Service*, 73 M.S.P.R. 376

---

[24] *King v. Erickson, supra*, at pp. 1585-1586; Petitioner's Appendix, pp. 85a-86a.

[25] *King v. Erickson, supra*, at pp. 1585-1586.

[26] Respondent Erickson's Appendix, 4a-7a.

(1997), the MSPB found the ALJ had erred in considering Mr. Jefferson's initial denial of misconduct in the penalty phase of the case. There was nothing in the case to suggest, however, that Mr. Jefferson had made affirmative misstatements about items he had removed from waste mail.

The thrust of Petitioner's argument is that *King v. Erickson, supra* offends this Court's holdings that no provision of the Constitution sanctions a right to lie or commit perjury. In support of such proposition, Petitioner relies primarily on *United States v. Dunnigan*, 507 U.S. 87 (1993).

The question undertaken in *Dunnigan* was whether the Constitution permits a court to enhance a defendant's sentence under Sentencing Guidelines, enacted by Congress, if the defendant commits perjury at trial.[27] Sharon Dunnigan, who testified during her trial, repeatedly denied wrongdoing in the face of overwhelming evidence that she had engaged in cocaine trafficking. U.S.S.G. § 3C1.1 (Nov. 1989) provided for enhancement of a sentence where the defendant willfully impeded or attempted to impede the administration of justice during the prosecution of the offense. The commentary to the statute included untruthful testimony during trial "or other judicial proceeding" as implicating such provision. *Id.*, 507 U.S. at p. 92.

---

[27] Petitioner notes that the Sentencing Guidelines at issue also penalize unsworn false statements that obstruct an investigation, (*Brief for the Petitioner*, p. 23, footnote 6) but *Dunnigan* did not address the constitutionality of this provision.

This Court noted that the Sentencing Guidelines were to determine the appropriate type and extent of punishment after resolution of the issue of guilt. A defendant's perjury was relevant to this inquiry because it reflected on her history, her attitude toward the law and her character in general. *Id.*, 507 U.S. at p. 94.

Nevertheless, to prevent testimony which was the product of mistake or confusion from becoming the source of a sentence enhancement, the Court held that the alleged perjury must meet all the elements of the perjury statute, 18 U.S.C. § 1621. Further, trial courts were directed to make specific findings of fact on each element of the perjury statute prior to enhancing a sentence. *Id.*, 507 U.S. at p. 95. This protection, the Court held, would prevent an automatic enhancement when defendants testify on their own behalf. *Id.*, 507 U.S. at p. 97.

Respondent Erickson disputes Petitioner's contention that *King v. Erickson* creates or sanctions a right to lie. The *Erickson* Court specifically rejected that notion[28] and Petitioner's unremitting characterization of the case as standing for such a proposition is simply intended to be inflammatory. The assumption behind the contention is that when an employee denies misconduct, he is lying.

Beyond the mischaracterization of the *Erickson* holding, use of a criminal law model in analyzing what process is due in this context simply collapses when the model is strictly applied. The defendants in all the criminal cases cited by Petitioner appeared before independent, non-partial fact-finders. All of the defendants were

---

[28] *Id.*, at p. 1583.

convicted of either the underlying offense or a perjury charge that requires proof beyond a reasonable doubt.

Conversely, when federal employees are facing misconduct charges, the employing agency will investigate the facts, formulate the charges, if any, and will adjudicate guilt or innocence. Petitioner is correct that federal employees are afforded full evidentiary hearings before the Merit Systems Protection Board, *Brief for the Petitioner*, p. 18, but these hearings occur *post-deprivation* and are initiated upon an employee's appeal. 5 U.S.C. § 7513 (d). The issue of the employee's right to a meaningful response must be viewed from the perspective of what due process is owed to the employee in a *pre-deprivation* setting. *Cleveland Board of Education v. Loudermill, supra,* at 470 U.S. 541.

Further, agency officials are under no compulsion to determine the facts by any particular standard of proof, other than the general standard that a contemplated action must occur "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513. They can choose to rely on a preponderance of the evidence or little evidence. James Grubka was demoted for falsification, among other charges, when Harriet Novak accused him of kissing her. Lester Erickson was removed, in part, for "making false statements in matters of official interest"; however, he was never even charged with engaging in the misconduct at issue.[29] The deciding official in *Greer v. United States Postal Service,* 43 M.S.P.R. 180 (1990),

---

[29] Petitioner's Appendix, 50a-58a.

accused the employee of falsely denying the misconduct and lying about various factual matters in connection with the misconduct. Although the underlying misconduct was proven, all of the other alleged "lies" proved to be true. The agency official, the M.S.P.B held, had erroneously presumed that the employee had lied about these facts and erroneously considered them in determining the penalty. *Id.*, at p. 189.

The distinction between criminal law and federal employment law is also significant in terms of when the deprivation occurs. Deprivation of an individual's liberty does not occur until after he or she is proven guilty of an offense beyond a reasonable doubt. Up until that moment, the defendant may plead "not guilty," regardless of his actual guilt or innocence. Petitioner cites no cases that stand for the proposition that a defendant risks a perjury charge by pleading "not guilty." After the issue of guilt has been resolved, a defendant's perjury at trial may be considered in enhancing a sentence. *United States v. Dunnigan, supra,* at 507 U.S. p. 94.

In the federal employment cases before this Court, the falsification charges supplanted the actual charges of misconduct, in terms of importance, and became the impetus for property deprivations, regardless of the nature and degree of the underlying misconduct, the proof of the underlying misconduct, or whether the targeted employees were even charged with the underlying misconduct. The denial of misconduct itself formed the basis for the property deprivation.

Finally, none of the agency officials herein set forth detailed findings of fact to sustain a falsification charge

akin to perjury. In short, the various protections that have been built into the criminal law system do not exist at the pre-deprivation level of federal employment. They need not. Pre-deprivation procedures are only intended to be an initial check against erroneous determinations. *Cleveland Board of Education v. Loudermill, supra,* at 470 U.S. pp. 543-545. The gaps, however, between Petitioner's criminal law analogy and the actual circumstances of federal employment only serve to beg the question as to what minimum due process procedures are owed in order to afford a federal employee a meaningful right to respond at the pre-deprivation level. According to this Court's holding in *Loudermill,* the employee's opportunity to present his side of story, prior to deprivation of his property interest, is an essential due process requirement. *Id.,* at p. 545. The question this Court must now answer is whether a federal employee can be punished for telling his side of the story if it differs from the agency's version.

This Court has consistently stated that due process is not a technical conception with a fixed content unrelated to time, place or circumstances. It is flexible and calls for such procedural protections as the particular situation demands. *Gilbert v. Homer,* 117 S. Ct. 1807, 1818 (1997); *Hannah v. Larche,* 363 U.S. 420, 442 (1960). To determine what process is due, three factors must be balanced: (1) the private interest that will be affected by the official decision; (2) the risk of an erroneous deprivation of such an interest through the procedures used and the probable value, if any, of additional or substitute safeguards, and; (3) the government's interest. *Gilbert v. Homer, supra,* at 1812.

This Court has accorded significant weight to an employee's private interest in retaining employment. Deprivation of a livelihood is a severe penalty. *Cleveland Board of Education v. Loudermill, supra,* at 470 U.S. 543. Since, as stated earlier, suspensions for over fourteen days and reductions in grade and pay are included as "actions" for which an employing agency must have "cause" to initiate[30], due process procedures are appropriate for these lesser actions as well. In any event, it is unquestioned that reductions in grade and pay can substantially impact an individual's life.[31]

As for the risk of an erroneous deprivation, it is undisputed that in the cases at bar, it was the additional falsification charges that resulted in either demotion or termination. Once the falsification charges were removed, the remaining charges only warranted letters of reprimand or suspensions. *King v. Erickson, supra,* at p. 1583.[32] As demonstrated above, disputed factual scenarios are common and the deciding official's decision to tack on a falsification charge is often motivated by his or her initial

---

[30] 5 U.S.C. § 7512, 5 U.S.C. § 7513.

[31] See *Grubka v. Department of Treasury, supra,* employee deprived of over $12,000 in income; and *Greer v. United States Postal Service, supra,* employee demoted to position that required him to make 100 mile round trip to and from employment.

[32] See *Erickson v. Department of the Treasury, supra.* Without the falsification charge, Lester Erickson's misconduct consisted of urging a co-worker to make a "Mad Laugher" call and his penalty was mitigated from removal to a fifteen day suspension.

revulsion to the misconduct.[33] The choice faced by the employee is whether to admit misconduct and forego telling his "side of the story" because of the threatened falsification charge or tell his "side of the story" and risk the falsification charge and attendant consequences.

Petitioner is correct that many of the allegedly false statements in these cases were made during investigations, before any charges of misconduct had been formulated. It argues that employees' due process rights are not implicated in agency investigations because these investigations do not adjudicate legal rights and therefore do not deprive employees of their property interests (*Brief for the Petitioner*, p. 26). This statement overlooks the actual process. Charges of misconduct are formulated on the basis of an agency investigation. An employee is deprived of his property interest upon a final written decision issued by the agency. That decision becomes final unless the employee perfects an appeal.[34]

Petitioner argues that the lower court's ruling seriously interferes with the government's right to discipline or remove employees who lie. It cites two cases in support of its argument that "up to the present" (*Brief for the Petitioner*, p. 37), the Merit Systems Protection Board has upheld false statement charges against employees. However, one such case, *Vazquez v. Department of the Justice*, 12 M.S.P.R. 379 (1982) was decided prior to *Grubka*. The only decision of the MSPB after *Grubka* upholding a charge for

---

[33] *Grubka v. Department of the Treasury, supra; Greer v. United States Postal Service, supra.*

[34] 5 U.S.C. § 7513; 5 U.S.C. § 7701; *Grubka v. Department of the Treasury, supra.*

falsely denying misconduct is *Greer v. United States Postal Service, supra*. In that case, the Board distinguished *Grubka* because it found that the facts demonstrating misconduct in the latter case were more equivocal than in the former. In any event, it concluded that many of the alleged false statements were in fact true statements and mitigated the penalty to a sixty day suspension. Other cases cited by the government regarding falsification of documents are not relevant to this proceeding as the Federal Circuit made it clear that such conduct remained subject to disciplinary proceedings.

Petitioner argues that its interests would be seriously affected by adoption of the *Erickson* rule. Government investigators would be misled with an attendant disruption in proceedings (*Brief for the Petitioner*, p. 33). The *Erickson* court noted that the burden is on the employing agency to prove charges of misconduct and it has the means of proving the charges other than through the admissions or denials of the targeted employee.[35] In fact, in all but one of the cases before this Court, the Agency did succeed in proving misconduct by other means.[36]

---

[35] *Id.*, at p. 1584.

[36] *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994) (nurse's improper relationship with patient proven by patient's testimony, which was more plausible than nurse's); *Erickson v. Department of the Treasury, supra* (involvement in "Mad Laugher" prank never proven because employee was never charged; however, it was proven that employee encouraged a co-worker in the prank on the basis of the co-worker's testimony); *Kye v. Defense Logistics Agency*, 64 M.S.P.R. 570 (1994) (charges for misuse of a credit card upheld, although supporting evidence not recounted); *Barrett v. Department of the Interior*, 65 M.S.P.R. 186 (1994) (supervisor's and subordinates'

In arguing that agency investigations will be thwarted by *Erickson,* Petitioner again mischaracterizes the rule as affording employees an unchecked freedom to lie (*Brief for the Petitioner*, p. 33). Employees are not free to lie. They will be held accountable for statements that venture beyond the line of denial into outright misstatements of facts. *Kirkpatrick v. United States Postal Service, supra* (penalty of removal upheld in part for falsified statements).

Petitioner cannot show that separating denials of misconduct from false statements is an onerous burden. Its brief avoids any attempt at establishing such a reasonable line by continually characterizing the Federal Circuit decision as conferring a right to lie. Sgt. Erickson is not advocating a right to lie or to provide false information to the government during an investigation. Rather, as part of his Fifth Amendment right to respond to charges against him, he simply seeks the opportunity to deny allegations of misconduct.

Finally, Petitioner appeals to this Court to overturn *Erickson* on the grounds that other individuals with other types of property interests will be given the freedom to lie (*Brief for the Petitioner*, pp. 38-40). Again, Petitioner has mischaracterized the holding. Further, this argument is beyond the scope of Petitioner's "Question Presented" (*Brief for the Petitioner*, pg (I)), which addresses the efficacy of the *Erickson* rule only in the context of federal

---

misconduct in building a fish pond with government equipment on government time proven by several eye-witnesses). In *McManus v. Department of Justice*, 66 M.S.P.R. 586 (1995), the employee recanted his initial denial.

employment. Pursuant to Rules of the Supreme Court of the United States, Rule 24 (1)(a), Petitioner's attempt to raise additional issues is improper.

CONCLUSION

The origin of the rule enunciated in *King v. Erickson, supra* appeared in *Grubka v. Department of the Treasury, supra,* holding due process was violated by charging an employee with falsification when he denies misconduct.

King v. Erickson did not expand this rule into a right to lie. It reaffirmed that property interests entitle employees to a notice of charges and an opportunity to respond prior to deprivation. A right to respond could not be meaningful, the Court held, if an employee was threatened with a falsification charge when he denied misconduct. Accordingly, while an employee may be charged with falsification for affirmative misstatements of fact, he may not be so charged where his response consists of a simple denial of misconduct.

Petitioner mischaracterizes *Erickson* as affording federal employees an "expansive right to lie" and cites numerous criminal cases holding that various constitutional rights cannot shield individuals from the consequences of perjured testimony. These cases are inapplicable, in the first instance, because *King v. Erickson* neither creates nor sanctions a right to lie. Secondly, analyzing what due process procedures are owed to federal employees based on a criminal law model is inappropriate. Protections built into the criminal system do not exist in the civil service setting at a pre-deprivation

level. Due process procedures available at the pre-deprivation level consist of notice of charges and an opportunity to respond. The issue is whether an employee retains a meaningful opportunity to respond if he can be charged with falsification as a result of his response.

In balancing the employee's interest in his employment, the risk of erroneous deprivations, which can and do occur when employees are charged with falsification, and the government's interest, there is sufficient rationale to support the *Erickson* rule. Denials or admissions of misconduct by the suspected employees are not the only means by which agencies prove misconduct. Agencies retain the power to assert charges for falsification when an employee's statements extend beyond denial into affirmative misstatements.

Petitioner argues that due process rights are not implicated in agency investigations since these investigations do not adjudicate legal rights. To the contrary, an agency investigation of an employment matter can result in charges against an offending employee and a subsequent deprivation of his property interest. Unless the employee appeals, the agency's decision is final.

Without a thorough examination of other property interests and the unique circumstances that pertain to them, a prediction as to whether the *Erickson* rule can be expanded to other situations is merely speculative. In any event, the efficacy of the rule in contexts other than federal employment is beyond the scope of Petitioner's "Question Presented."

For the above reasons, Sgt. Erickson respectfully requests that the decision of the Federal Circuit court be affirmed.

Respectfully submitted this 11 day of September, 1997.

/s/ Paul E. Marth
Paul E. Marth
Attorney for Respondent Erickson